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MAYOR'S OFFICE OF STRATEGIC PLANNING & COMMUNITY DEVELOPMENT
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Case #: ZBA 2017-15

Date: ~~April 5, 2017~~ April 19, 2017

May 3, 2017

Recommendation: Uphold ISD Decision

Updated* ZBA STAFF REPORT

Site: 640 Mystic Avenue

Applicant Name: Linda Pingiaro, individually and as Trustee of 48-50 Ash Avenue Condominium Trust

Applicant Address: 48 Ash Avenue, Unit B, Somerville, MA 02145

Alderman: Tony LaFuente

Legal Notice: Applicant, Linda Pingiaro, individually and as a Trustee of 48-50 Ash Avenue Condominium Trust, seeks an Administrative Appeal per SZO §3.1.9, 3.2, and 3.2.3 from a decision by the Inspectional Services Department to refuse to stop work under a building permit issued for a residential structure at 640 Mystic Ave. The property owner is 640 Mystic Avenue LLC (previous owner El Camino LLC). BB Zone. Ward 4.

Dates of Public Hearing: ~~April 5, 2017~~ April 19, 2017 May 3, 2017

This staff report has been updated since the April 19, 2017, ZBA hearing date. Information that no longer applies has been ~~struck through~~ and updated information is **highlighted in yellow**.

I. GROUNDS FOR APPEAL

Linda Pingiaro, individually and as a Trustee of 48-50 Ash Avenue Condominium Trust (hereafter referred to as "Ms. Pingiaro") is an abutter to the property at 640 Mystic Avenue. The property at 640 Mystic Avenue is the subject of the appeal. Ms. Pingiaro alleges that the Building Permit issued by the Inspectional Services Division (ISD) dated October 25, 2016, was wrongly granted and should be revoked. Ms. Pingiaro contends that "...the proposed project requires a special permit, fails to lessen congestion in the streets; to protect health; to prevent the overcrowding of land; to avoid undue concentration of population; to conserve the value of land and buildings; to adequately protect the natural environment; and to preserve and increase the amenities of the municipality in violation of SZO, §1.2. It also fails to comply with the SZO requirements for setbacks, height limitations, and parking."



Each of the complaints is enumerated below:

1 – Ms. Pingiaro alleges that: the building permit should be revoked "...because the proposed development for 640 and 654 Mystic Avenue violates the Somerville Zoning Ordinances and proposes substantial trespass on land owned by 48-50 Ash Avenue Condominium."

2 – Ms. Pingiaro alleges that: "...as represented by the owner of the property to the Somerville Historic Preservation Commission, the development of 640 Mystic Ave is part of a proposed 12 family development on 640 and 654 Mystic Ave which clearly requires a special permit with site plan review under SZO, §7.11(1)(c)."

3 – Ms. Pingiaro alleges that: "...the proposed development violates the purposes of the Somerville Zoning Ordinances, SZO, §1.2, to lessen congestion in the streets; to protect health; to prevent the overcrowding of land; to avoid undue concentration of population; to conserve the value of land and buildings; to adequately protect the natural environment; and to preserve and increase the amenities of the municipality.

- a. The development of 640 and 654 Mystic Ave as proposed will only add to already over congested traffic on Mystic Ave.
- b. The proposed trespassory construction of the first floor of the development on land beyond the retaining wall and fence on 48-50 Ash Ave and on property which is not otherwise held by the owners of 640 and 654 Mystic Ave fails to conserve the value of land and buildings in violation of SZO, §1.2.
- c. The properties surrounding 48-50 Ash Ave are already overcrowded and have undue concentrations of populations. The proposed project fails to prevent the overcrowding of land and avoid undue concentration of population.
- d. The view from 48-50 Ashe Ave to the Northeast overlooking 640 and 654 Mystic Ave is of the protected marshes and open spaces leading to the Mystic River. El Camino's proposed development will completely block that view. Accordingly, the proposed development fails to conserve the value of land and buildings and to preserve and increase the amenities of the municipality in violation of SZO, §1.2.
- e. The plans for 640 and 654 Mystic Ave show a front yard setback of 10' and a rear yard setback of 15'. The minimum setbacks for both rear and front yards under the SZO for the proposed buildings is 15'. SZO, §1.28.5G. Because the plans are to build a 12 family structure on lots 640 and 654 Mystic Ave and because they include the demolition of the existing commercial building on 654 Mystic Ave, they cannot reduce the front yard setbacks under SZO, §1.28.5G, n. 5. Because rear lot line on the plans have been incorrectly located on land owned by 48-50 Ash Avenue Condominium, the proposed development will not have a rear yard setback of 15' from the actual lot lines between 640 and 654 Mystic Ave and 48-50 Ash Ave and therefore will also be in violation of the requirements of SZO, §8.5.
- f. Because 48-50 Ash Ave is within an RA zone District, only three stories and 40' above finished grade are allowed on 640 and 654 Mystic Ave within 30' of the rear lot line abutting 48-50 Ash Avenue. SZO, §8.5, n.20. The first floor of the proposed development is a first story as defined by SZO, §2.2.154 and not a basement as defined by SZO, 2.2.14. Therefore, the proposed development has four stories under the SZO. About three fifths of the proposed four story development will be at least within 30' of the lot line abutting 50 Ash Avenue in violation of SZO, §8.5.
- g. The proposed plans for parking do not have the required minimum dimensions for parking or the required ingress/egress circulation plans under SZO, §9.11(a) and (e).

II. BACKGROUND

1. **Subject Property:** *Note:* It is important for the ZBA to understand that, despite Ms. Pingiaro's contention that 640 Mystic Avenue and the abutting property at 654 Mystic Avenue are the subject of this appeal and of the development being undertaken, it is, in fact, only 640 Mystic Avenue that has received a building permit from the Inspectional Services Division (ISD).

Despite Ms. Pingiaro's contentions otherwise, 640 Mystic Avenue and 654 Mystic Avenue are two separate projects with two separate owners. Only 640 Mystic Avenue can be reviewed as part of this appeal.

Situated near the Somerville/Medford line opposite the southbound, elevated lanes of the 93 expressway, the project site at 640 Mystic Avenue is currently an active project site. The parcel is 3,920 square feet in the BB zone. The rear of the property abuts the RA district. The property owned by the 48-50 Ash Ave Condominium Trust abuts 640 Mystic Avenue at the rear.

1. **History:** Until recently, 640 Mystic Avenue presented a wood-framed, gable-fronted, c.1870 worker's cottage built on land owned by the Boston Bottle Works for its laborers.

- **December, 2015** – Owner applies to HPC to demolish building.
- **January, 2016** – HPC determines property to be “historically significant.”
- **February, 2016** – HPC determines property to be “preferably preserved” and imposes 9-month demolition delay.
- **May, 2016** – Owner applies for emergency demolition permit from ISD stating that it posed “an immediate hazard to public safety.”
- **May, 2016** – Supporting documents for demolition from structural engineer received by ISD.
- **July, 2016** – Demolition permit approved and issued by ISD.



Above: 640 Mystic Avenue at the time of demolition application to the Historic Preservation Commission (HPC).

The building has since been demolished.

- **August, 2016** - Application to construct a “by-right” (no zoning relief needed) 3-family residential building received by ISD.
- **October, 2016** – Application approved by ISD.
- **October 25, 2016** – Building Permit # B16-001297 issued ISD to construct the by-right, 3-family residential building.
- **December 19, 2016** – El Camino LLC sells the development site to 640 Mystic LLC. See attached file from the South Middlesex County Registry of Deed showing the owner of 640 Mystic Avenue as 640 Mystic Ave., LLC.

In the intervening months, work has commenced on the property.

- **January 3, 2017** – Ms. Pingiaro contacts ISD requesting regarding the construction on the site and stating that there has been trespass on her property due to the project. She requests that a Stop

Work Order be placed on the property. She believes that no building permit has been issued for the property.

- **January 6, 2017** – Counsel for Ms. Pingiaro sends a letter to Goran Smiljic, Director of ISD with the allegations stated in this appeal.
- **January 18, 2017** – Goran Smiljic, Director of ISD, responds to Ms. Pingiaro’s counsel via City letterhead stating that, despite Ms. Pingiaro’s claims, the project at 640 Mystic Avenue is allowed as-of-right. Goran Smiljic also states that, contrary to Ms. Pingiaro’s claims, 640 and 654 Mystic are separate projects with separate owners, lots, architectural drawings, and site plans. Director Smiljic also states that the City does not become involved in private property disputes. Director Smiljic states that no Stop Work Order shall be issued “unless and until” a violation is committed that requires City intervention. Director Smiljic advises counsel that ISD’s decision may be appealed to the ZBA within 30 days.
- **February 16, 2017** – Appeal application filed with the City Clerk.

III. APPEAL

1. **Role of the ZBA:** In an administrative appeal hearing, the ZBA hears appeals of the decision of the Superintendent of Inspectional Services. The process for such appeals is set out in MGL 40A, Section 8 and Section 3.2 of the SZO. An appeal may be taken by any person aggrieved by an order or decision of the Superintendent of Inspectional Services. The ZBA must determine whether to affirm the ISD decision or overturn it and why.

Staff believes that Ms. Pingiaro has status as an aggrieved party in this circumstance and that appeal is properly before the Board.

2. **Analysis of the Appeal:** OSPCD staff has reviewed:

- 1) the appeal application from Ms. Pingiaro;
- 2) the file for the property at Inspectional Services;
- 3) the Historic Preservation Commission’s file regarding the initial demolition application for this structure and the HPC’s subsequent determinations.

In her appeal, Ms. Pingiaro has put forth three main arguments and supporting claims. All have been noted above in Section I, “Grounds for Appeal.” A discussion of each of these arguments and supporting claims is discussed below.

1 – Ms. Pingiaro alleges that: the building permit should be revoked “...because the proposed development for 640 and 654 Mystic Avenue violates the Somerville Zoning Ordinances and proposes substantial trespass on land owned by 48-50 Ash Avenue Condominium.”

640 Mystic Avenue and 654 Mystic Avenue are two different, separate projects whose development parcels abut each other. At no time have these projects been owned by the same entity. Though the projects shared the same architect and that architect presented renderings at times that showed what the two sites would look like with both developments complete, the projects are completely separate from each other. Thus, only 640 Mystic Avenue shall be addressed in this staff report.

The City does not get involved private property disputes, including issues regarding trespass. This is a private matter between property owners and not relevant to a building permit appeal.

2 – Ms. Pingiaro alleges that: “...as represented by the owner of the property to the Somerville Historic Preservation Commission, the development of 640 Mystic Ave is part of a proposed 12 family development on 640 and 654 Mystic Ave which clearly requires a special permit with site plan review under SZO, §7.11(1)(c).”

Neither the owners of these properties nor the architect of these two projects presented 640 Mystic Ave as part of the separate 654 Mystic project. The project at 640 Mystic is a 3-family development only. 640 Mystic and 654 Mystic lots are not merged and the structure proposed at 640 Mystic is a separate structure from any structure at 654 Mystic Avenue.

At a Historic Preservation Commission (HPC) meeting, the architect for 640 Mystic presented a rendering of the replacement structure he proposed for that site. In that presentation, the architect’s renderings also showed what the 640 Mystic site might look like next to a built-out 654 Mystic site for which he was also the architect. The presentation was explained to the HPC to ensure that they understood that the presentation was intended to show the relationship between the proposed 640 Mystic building and its current and potential future surroundings.

To re-iterate:

640 Mystic Avenue and 654 Mystic Avenue are two different, separate projects whose development parcels abut each other. Though the projects shared the same architect and that architect presented renderings at times that showed what the two sites would look like with both developments complete, the projects are completely separate from each other. Thus, only 640 Mystic Avenue shall be addressed in this staff report.

3 – Ms. Pingiaro alleges that: “...the proposed development violates the purposes of the Somerville Zoning Ordinances, SZO, §1.2, to lessen congestion in the streets; to protect health; to prevent the overcrowding of land; to avoid undue concentration of population; to conserve the value of land and buildings; to adequately protect the natural environment; and to preserve and increase the amenities of the municipality.

An “as-of-right” project such as this one approved by ISD for 640 Mystic Avenue does not trigger review under §1.2 of the SZO. IF the ZBA were to determine that a dimensional or use special permit is required, then the applicant would have to apply for such a special permit. At that time, the ZBA may consider the provisions of the purpose statement of zoning in the review of a special permit. Otherwise, there is no statutory requirement that permits ISD to review an “as of right” project for consistency with purpose of the ordinance.

- a. The development of 640 and 654 Mystic Ave as proposed will only add to already over congested traffic on Mystic Ave.**

640 Mystic Avenue and 654 Mystic Avenue are two different, separate projects whose development parcels abut each other. Though the projects shared the same architect and that architect presented renderings at times that showed what the two sites would look like with both developments complete, the projects are completely separate from each other. Thus, only 640 Mystic Avenue shall be addressed in this staff report.

The 640 Mystic Avenue project is a 3-family building that allows for a total of 6 cars on the site. The project is an “as of right” project, and therefore does not trigger a requirement to review traffic as a part of the ISD review for a building permit. IF the ZBA were to determine that a dimensional or use special permit is required, then the applicant would have to apply for such a special permit. At that time, the ZBA may consider traffic impacts in the review of a special permit. Otherwise, there is no statutory requirement that permits ISD to review an “as of right” project for traffic impacts.

- b. The proposed trespassory construction of the first floor of the development on land beyond the retaining wall and fence on 48-50 Ash Ave and on property which is not otherwise held by the owners of 640 and 654 Mystic Ave fails to conserve the value of land and buildings in violation of SZO, §1.2.**

The City does not get involved in property disputes and takes no position on allegations of trespass. This is an issue that must be worked out privately between property owners.

As noted above, an “as-of-right” project such as this one approved by ISD for 640 Mystic Avenue does not trigger review under §1.2 of the SZO.

640 Mystic Avenue and 654 Mystic Avenue are two different, separate projects whose development parcels abut each other. Though the projects shared the same architect and that architect presented renderings at times that showed what the two sites would look like with both developments complete, the projects are completely separate from each other. Thus, only 640 Mystic Avenue shall be addressed in this staff report.

- c. The properties surrounding 48-50 Ash Ave are already overcrowded and have undue concentrations of populations. The proposed project fails to prevent the overcrowding of land and avoid undue concentration of population.**

The proposed project meets the dimensional requirements of the BB district.

- d. The view from 48-50 Ashe Ave to the Northeast overlooking 640 and 654 Mystic Ave is of the protected marshes and open spaces leading to the Mystic River. El Camino’s proposed development will completely block that view. Accordingly, the proposed development fails to conserve the value of land and buildings and to preserve and increase the amenities of the municipality in violation of SZO, §1.2.**

Note that El Camino has not been the owner of the property at 640 Mystic Avenue since December, 2016, and as building permits travel with the property, not the owner, the ownership is not relevant to this case.

An “as-of-right” project such as this one approved by ISD for 640 Mystic Avenue does not trigger review under §1.2 of the SZO.

640 Mystic Avenue and 654 Mystic Avenue are two different, separate projects whose development parcels abut each other. Though the projects shared the same architect and that architect presented renderings at times that showed what the two sites would look like with both

developments complete, the projects are completely separate from each other. Thus, only 640 Mystic Avenue shall be addressed in this staff report.

- e. **The plans for 640 and 654 Mystic Ave show a front yard setback of 10' and a rear yard setback of 15'. The minimum setbacks for both rear and front yards under the SZO for the proposed buildings is 15'. SZO, §1.28.5G. Because the plans are to build a 12 family structure on lots 640 and 654 Mystic Ave and because they include the demolition of the existing commercial building on 654 Mystic Ave, they cannot reduce the front yard setbacks under SZO, §1.28.5G, n. 5. Because rear lot line on the plans have been incorrectly located on land owned by 48-50 Ash Avenue Condominium, the proposed development will not have a rear yard setback of 15' from the actual lot lines between 640 and 654 Mystic Ave and 48-50 Ash Ave and therefore will also be in violation of the requirements of SZO, §8.5.**

640 Mystic Avenue and 654 Mystic Avenue are two different, separate projects whose development parcels abut each other. Though the projects shared the same architect and that architect presented renderings at times that showed what the two sites would look like with both developments complete, the projects are completely separate from each other. Thus, only 640 Mystic Avenue shall be addressed in this staff report.

Ms. Pingiaro's allegations are moot. She alleges that a 12-family structure is to be built. As explained earlier, only a 3-family structure is to be built on 640 Mystic Avenue.

Regarding the rear lot line, contentions of trespass must be resolved privately between property owners. The property has been surveyed and, based on the instrument survey, the property will have the appropriate rear yard setback.

Section 8.5, footnote 12 of the SZO states that *"Side and rear yards for sites abutting residential districts [Staff note: including BB zone sites]: Where a lot in a business or industrial district abuts a lot or district line in a RA, RB or RC district, no building in the business or industrial district shall be erected closer to the residential line than one-third (1/2) the height of the said building, **but not less than fifteen (15) feet** [emphasis Staff's]."* This information is noted in the plan set page A-020 and indicates the 15-foot buffer proposed.

Regarding the front yard setback, §8.5 G, footnote 5 states: *"Front yard: If the average front yard depth of two (2) or more existing buildings on each side of a lot within one hundred (100) feet and within the district and same block, uninterrupted by an intersection, is less than the required front yard, the average of such existing front yard depths may be the required front yard depth for buildings of three (3) stories or less, **but in no case may the front yard depth be less than ten (10) feet**" [emphasis is Staff's].* This clause allows for the front yard of this project to be 10 feet. The structures within 100 feet of 640 Mystic Avenue are built right up to the sidewalk, leaving no frontage. The 10-foot front yard setback is, therefore, allowed.

After Ms. Pingiaro's attorney identified some questions about this front setback, the staff reviewed this information with the designers working on the project. The plan had intended to put bays in front of the 10 foot front setback. The applicant has now made adjustments to address these concerns, as minimum 10-foot setback is required here, and these bays cannot project in front of the setback.

Since the April 5 ZBA hearing, the Planning Office and ISD advised the Applicant's team of this issue. The Applicant has submitted new plans to both the Planning Office and to ISD remedying

this issue. These portions of the building have now been reduced to be flush with the main front façade of the building. The 10-foot setback is now being maintained.

At the April 5 ZBA hearing, the location of the height of the front steps was raised as well, with the Complainant asserting that the front steps appeared to be higher than three (3) feet. However, section 8.6 of the SZO states that steps shall not be of a height that is more than three (3) feet above average finished grade [emphasis Staff] per Section 8.6 note B. The average grade on the lot is 5' 5". Therefore, 5' 5" plus 3' 0" allowed equals an 8' 5" stair. The proposal complies with these requirements.

At the April 19th ZBA hearing, the Board spoke at length with a representative from the architectural firm that designed the proposed building at 640 Mystic Avenue regarding the exact height of the top step. Sheet A-022* caused particular concern among the Board as it was not clear to them how this final height was determined. Staff has worked with the architectural firm at length to try to ensure that the source of the confusion has been mitigated. To that end, the architect has included additional explanatory text on this page and made other related adjustments throughout the plan set for consistency. (* The numbers on the right side of Sheet A-022 represent sea level measurements.)

The final height of the top step is not more than 3 feet above average finished grade. Mystic Avenue is at 19 feet above sea level. The top step is 27' 5" above sea level (the difference between 27' 5" above sea level and 19 feet above sea level is 8' 5"). The top step is shown at 8' 5" above Mystic Avenue. The average finished grade of the lot is 5' 5" above the surface of Mystic Avenue. As presented, this puts the top step at 3 feet above average finished grade. (The calculations used to determine average finished grade were reviewed with the Board by the architect at the April 19, 2017 meeting via sheet A-021. Please refer to this sheet for establishment of average finished grade.)

- f. **Because 48-50 Ash Ave is within an RA zone District, only three stories and 40' above finished grade are allowed on 640 and 654 Mystic Ave within 30' of the rear lot line abutting 48-50 Ash Avenue. SZO, §8.5, n.20. The first floor of the proposed development is a first story as defined by SZO, §2.2.154 and not a basement as defined by SZO, 2.2.14. Therefore, the proposed development has four stories under the SZO. About three fifths of the proposed four story development will be at least within 30' of the lot line abutting 50 Ash Avenue in violation of SZO, §8.5.**

To construct the project at 640 Mystic Avenue, fill will be brought in in order to alter the grade of the land surrounding the proposed structure. Zoning law does not prohibit a property owner from bringing in fill to change the grade of the land. The additional fill will provide for only 3 stories / 40 feet of the new building to rise above the new finished grade and, thus, is not in violation of the SZO. Sheet A-020 shows the height/story dimensions, numerically and in text.

At the request of the ZBA, staff reviewed this grade issue again, and continues to believe that the average grade meets the zoning requirements. For a site that slopes up, like this site, the finished grade is measured at the edge of the building. Figure 2E shows a circumstance where the ground slopes away from the building, such as when a building is on a hill, above street level. In this case, there is an alternative way to calculate grade. But, this alternative case does not apply here, as the building is not set back behind street level on a hill, but actually has an area that is

generally level between the street and the front building wall. Therefore, mean grade is measured from the edges of the building, where it is, therefore, compliant.

The issue of lot lines has already been addressed in this report.

640 Mystic Avenue and 654 Mystic Avenue are two different, separate projects whose development parcels abut each other. Though the projects shared the same architect and that architect presented renderings at times that showed what the two sites would look like with both developments complete, the projects are completely separate from each other. Thus, only 640 Mystic Avenue shall be addressed in this staff report.

- g. The proposed plans for parking do not have the required minimum dimensions for parking or the required ingress/egress circulation plans under SZO, §9.11(a) and (e).**

Sheet A-100 of the plan set shows that the 6 parking spaces for 640 Mystic Avenue are full-sized (9x18) with a required 20-foot drive aisle and the required 1-foot radius around posts. The parking proposal complies with the SZO.

IV. RECOMMENDATION

- After review of the issues raised in the appeal, the Planning staff concludes that the issues do not constitute a basis for overturning the decision from ISD.
- Planning staff recommends that the ZBA **DENY** Ms. Pingiaro's administrative appeal.